No. 14,971

IN THE

United States Court of Appeals

For the Ninth Circuit

LEUN GIM,

Appellant,

vs.

HERBERT R. BROWNELL, JR., Attorney General of the United States, and BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco, California,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,
United States Attorney.
CHARLES ELMER COLLETT,
Assistant United States Attorney,
422 Post Office Building,
7th and Mission Streets,
San Francisco 1, California,
Attorneys for Appellee.

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BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

The appellant claims birth in China (Br. p. 1) and citizenship in the United States by way of naturalization (Tr. p. 1). He alleges that upon the representations made in affidavits filed with the American Consul at Hong Kong, a travel document was issued to the alleged wife and four children of the appellant and they were permitted to travel to the United States to apply to the Immigration and Naturalization Service for admission to the United States as the wife

and children of the appellant (Tr. p. 3). They apparently arrived at the port of entry San Francisco on October 14, 1947.

In paragraph VII of the complaint (Tr. p. 4) appellant alleges "That the findings of *the* hearing by the Board of Special Inquiry ordering the above named children of the plaintiff excluded from the United States were adopted on July 21, 1948 by the Commissioner of the Immigration and Naturalization Service."

Although not alleged, a reasonable inference is that a hearing was had before the Board of Special Inquiry in accordance with applicable law and regulations, and that an appeal was taken from the ruling of the Bord of Special Inquiry to the Board of Immigration Appeals, and that the ruling of the Board of Special Inquiry was sustained and the appeal dismissed.

Appellant alleges in paragraph VIII of the complaint (Tr. p. 4) "That the above named said four (4) children of the plaintiff, Leun Gim, were duly excluded and deported on the grounds that they were not the natural and legal children of the plaintiff . . ." From this allegation it is reasonable to infer that no attempt was made to obtain judicial review of the final decision of the Immigration and Naturalization Service and that the said four children having been excluded, returned to China. Appellee filed a motion to dismiss the complaint, calling the court's attention to an identical complaint filed by appellant on June 3, 1952 (No. 31583) in the same court. Action No. 31583

was dismissed on June 14, 1954 and no appeal was taken from the order of dismissal.

JURISDICTION.

Appellant in his brief has made no attempt to meet the jurisdictional question. In the section of his brief entitled "Jurisdictional Statement" he has made reference to the general jurisdiction of the Appellate Court to review judgments of the District Court (28 U.S.C.A. 1291 and 1292).

QUESTION PRESENTED.

Appellee fails to discover any question presented.

The statement of points cites error in the trial court in dismissing the complaint for want of jurisdiction and failure to state a claim.

ARGUMENT.

Appellant has cited and quoted the pertinent provisions of Public Law 271, 79th Congress, 54 Stat. at 659. He admits acting timely in making application under said statute (Par. VI, Tr. p. 3). The State Department, through the American Consul at Hong Kong, received the application and granted permission to the persons mentioned in the application to travel to the United States to apply for admission

to the Immigration and Naturalization Service (Par. VI, Tr. p. 3).

Appellant and the persons who claimed to be his wife and children, the same persons named in the complaint herein, failed to establish the claimed relationship to appellant and they were excluded. After the appeal to the Board of Immigration Appeals was dismissed they all returned to China.

The argument of appellant is short. On page 4, line 3 of the brief, he says:

> "The benefits, privileges and rights * * * accrued to the children * * * by virtue of this 'Statute' "

but in the next sentence he opines:

> "The children and wife of the father (appellant) could not be said to have acquired any rights under the statute, because of the failure of the father * * *."

He then concludes in a new paragraph beginning line 12:

> "We therefore must conclude that the appellant acquired a right by virtue of the 'Statute' to bring his children to the United States."

This conclusion goes back to the beginning of the argument which quotes the statute and says:

> "The appellant acted timely, and the four (4) children and wife made their application before the United States Immigration and Naturalization Service for admission on 14 October 1947."

In line 20 appellant poses a question although there is no question mark at the end. We believe the "can"

and "we" should be transposed so the sentence begins "We can therefore contend that the rights of the appellant arising by virtue of the Statute were summarily cut off only by reason of the appellee's conduct in deporting the appellant's children."

Appellant does not state that he does so contend. Neither does he clarify the contention nor support it with authority.

Knauff v. Shaughnessy, 338 U.S. 537.

The matter presented on page 5 of the brief discloses no justiciable issue as to the appellee and no issue as to any rights of appellant or his alien spouse and children. The persons he named were permitted to come forward but were unable to establish their claims and so were deported.

The gist of appellant's argument under (2) on page 5 is that the complaint states a cause because it states a cause.

The identical complaint was the subject of action No. 34615. Judge Carter afforded plaintiff, appellant herein, full opportunity to direct the court's attention to some authority (Tr. p. 2). This he failed to do. No appeal was taken from the order of dismissal of June 14, 1954. Appellant having failed to appeal from the first action, filed a complaint instituting the same claims as a new cause of action. The final order in action No. 34615 is *res judicata.*

United States v. California, 192 U.S. 355;

Baltimore S. S. Co. v. Phillips, 274 U.S. 316.

CONCLUSION.

Appellee submits the appeal herein is without merit, is frivolous and should be dismissed.

Dated, San Francisco, California,
July 3, 1956.

LLOYD H. BURKE,
United States Attorney,
CHARLES ELMER COLLETT,
Assistant United States Attorney,
Attorneys for Appellee.